Office - Supreme Court, U.S.
FILED
MAY 1 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VAN WEELDE BROTHERS SHIPPING LIMITED, and
JOONG ANG SHIPPING CO., LTD.,
Petitioners,

vs.

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

ALEX T. HOWARD, JR.*
THOMAS S. RUE
JOHNSTONE, ADAMS, HOWARD,
BAILEY and GORDON
P. O. Box 1988
Mobile, Alabama 36633
(205) 432-7682

HENRY S. MORGAN
VINSON & ELKINS
First City Tower
1001 Fannin
Houston, Texas 77002
(713) 651-2736

Attorneys for Respondents, Incas and Monterey Printing and Packaging, Ltd.

**Counsel of Record*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether there is presented a sufficient question as to whether Supplemental Rule C violates the due process clause of the United States Constitution.

2. Whether this Court should review the construction of Supplemental Rule E(7) made by the court of appeals in this case.

TABLE OF CONTENTS

	Page
Statement Of The Case	1
Summary Of The Argument	7
Reasons For Denying The Writ:	
I. The Court of Appeals Simply Interpreted The Wording Of Supplemental Rule E(7) Without Addressing The Broad, Equitable Power Of The District Court, Sitting In Admiralty, To Require Counter-Security For A Counterclaim Which Did Not Arise Out Of The Same Transaction Or Occurrence As The Original Action	9
II. There Is No Conflict Between The Circuits As To The Equitable Power Of A District Court To Require Counter-Security, The Constitutionality Of Rules B and C, Or The Interpretation Of Rule E(7)	10
A. Equitable Power of a District Court to Require Counter-Security	10
B. Constitutionality of Rules B and C	11
C. Interpretation of Rule E(7)	14
III. The Opinion Of The Court Of Appeals In This Case Is Not In Conflict With The Decisions Of This Court	15
A. Equality of Security	15
B. Compulsory Counterclaim Rule	19
Conclusion	21

Certificate of Service 23

Appendix A-1

TABLE OF AUTHORITIES

Cases:

Amstar Corp. v. S/S ALEXANDROS T., 664 F.2d 904 (4th Cir. 1981) 11

Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation, 605 F.2d 648 (2d Cir. 1979) 11

Cardinal Shipping Corp. v. M/S SEISHO MARU, 744 F.2d 461 (5th Cir. 1984) 20

Empresa Maritima a Vapor v. North & South American Steam Navigation Co., 16 F. 502 (S.D.N.Y. 1883) 7, 15, 22

Merchants National Bank v. The Dredge GENERAL G. L. GILLESPIE, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed,* 456 U.S. 966, 102 S.Ct. 2263, 72 L.Ed.2d 865 (1982) 9, 10, 11, 22

Moore v. New York Cotton Exchange, 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926) 19, 20

Plant v. Blazer Financial Services, Inc., 598 F.2d 1357 (5th Cir. 1979) 20

Polar Shipping Ltd. v. Oriental Shipping Corp., 680 F.2d 627 (9th Cir. 1982) 11

Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi, 732 F.2d 1543 (11th Cir. 1984), *petition for rehearing en banc granted,* 743 F.2d 763 (1984) .. 7, 15, 22

Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co., 266 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480 (1924) 7, 15, 22

Rules:

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule B 21

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule C 21

Supplemental Rules for Certain Admiralty and Maritime Claims, Rule E(7) ..... *passim*

Eleventh Circuit Rule 26(k) 15

No. 84-1565

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

VAN WEELDE BROTHERS SHIPPING LIMITED, and
JOONG ANG SHIPPING CO., LTD.,
Petitioners,

vs.

INCAS AND MONTEREY PRINTING AND PACKAGING, LTD.,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioners' Statement of the Case omits certain key elements of this litigation, and Petitioners' representation of the facts of this case distorts the overall testimony of the witnesses by quoting isolated bits of testimony taken during depositions which lasted many hours.

The facts as stated in the opinion of the United States Court of Appeals for the Fifth Circuit are accurate, but we wish to supplement same.

Although initially Respondents were not given an adequate opportunity in the district court to explain their inability to post

counter-security for the counterclaims of Van Weelde Brothers Shipping, Limited[1] as ordered by the district court, Respondents subsequently, in support of their Motion to Reconsider, did fully advise the district court of the impossibility of their posting such counter-security. It was not the financial inability of Respondents themselves that made same impossible but the inability of their poor, Third World, African countries, namely, Somalia and Zambia, to externalize sufficient hard, western currency to comply with the order of the district court that they post a bond in the amount of $1,475,000.

In support of their Motion to Reconsider, Respondents filed in the district court affidavits of Adan Abdi Hussein, President of Incas in Somalia, and Michael Gordon Purslow, Managing Director of Monterey Printing & Packaging, Ltd. in Zambia, establishing the inability of those countries to externalize such funds. Copies of both affidavits appear in the Appendix at pages A-1 and A-9.

Mohamed Warsame Elmi, General Director of Incas, testified at his deposition[2] as follows:

> Q: What did [the Bank] tell him with respect to the money for the bond?
>
> A: That they didn't have the money to pay such a sum, amount.
>
> Q. Did they indicate whether they would be able to have that money at any time in the future?

---

[1] Only Van Weelde, the charterer, has filed a counterclaim. Joong Ang Shipping Co., the owner of the M/V SANG JIN, has filed no counterclaim.

[2] It should be noted that Mr. Elmi was questioned through an Italian translator and various difficulties were encountered with the language barrier during the deposition.

A. No.

Q. Is this a problem with the availability of foreign currency or is it a problem of the bank in Somalia not having much money or is it a problem of the bank in Somalia not being willing to lend Incas that much money?

A. Practically, it is a problem with foreign currency.

Q. How hard is it for Somalian companies to obtain foreign currency?

A. It is very difficult with the bank because they are always on short touch of foreign currency.

* * *

Q. Is the Somalian shilling readily traded in financial markets around the world?

A. No, not the Somalian shilling.

Q. Is there any way that Incas can obtain foreign currency without going through the Bank of Somalia?

A. No. There aren't any.

* * *

A portion of the affidavit of Michael G. Purslow, Managing Director of Monterey, reads as follows:

> [I]t is simply not possible for my company to provide security, or indeed any part thereof, which has been ordered in favour of the Defendants. The reasons for that inability result from the severe restrictions on the use of limited foreign exchange resources to which I have referred above. My company has, nevertheless, made application to the Bank of Zambia in order to endeavour to obtain the necessary allocation of foreign exchange which would enable security to be provided; at the time such application

was made the sum of US $2.96 million, being the quantum of the Defendants' notified Counterclaim, was requested. That request has been firmly rejected as evidence of which there is now produced and shown to me a true copy of a telex dated 13th October 1982 from the Bank of Zambia which is Exhibit "MGP 1" hereto. Throughout the period concerned I have maintained close and regular touch with those concerned at the Bank of Zambia and it has been made quite clear to me, although this is not clear from the telex which is Exhibit "MGP 1" hereto, that even if a lesser sum had been requested this too would have been refused. In short, the Bank of Zambia, as custodian of the country's foreign exchange resources, is not prepared to allocate any of such scarce resources for the purpose requested.

Purslow Affidavit (October 14, 1982) at para. 11.

At Mr. Purslow's deposition, he testified as follows:

Q: Are you aware that the judge has ordered you and INCAS to post counter security?

A. Yes.

Q. What attempts have you made to comply with the Court's order?

A. Well, we have made a great number of attempts and put a great deal of effort into this and to the best of your [sic] ability, we have posted counter security as of—I would think we are waiting for a letter of guarantee from our bankers indicating this. Unfortunately, yesterday was a holiday in Zambia when I left but I would assume it would be issued, made to our lawyers on Wednesday or Thursday of this week and we, as a company, have been debited a half a million kwacha to allow that guarantee to be posted.

Q. Okay, what is the procedure of changing kwachas for dollars? You talk about the exchange commission—

A. Exchange control.

Q. Exchange control.

A. Well, it's all controlled by the Bank of Zambia, the exchange department.

Q. Is the Bank of Zambia the only bank in Zambia?

A. No, no, but it's the central bank and the only bank that has any authority in exchange control.

Q. What is the procedure for exchange?

A. Well, you can apply for whatever source or purpose you have of it. It will either be agreed or approved or denied and the difference between agreed and approved, if you, if it's agreed, you get it straight away. If it's approved, the supplier, the local funds is debited and then it goes into a pipeline along with many other debts.

Q. How long does that take?

A. It depends. There are various pipelines and import pipelines which now go back to September, 1979. There are personal piplines which go back two years, dividends pipelines.

Q. I'm sorry, I'm confused. You say it goes back?

A. That was the last time money was externalized against those particular bills.

* * *

Q. And I understand that, you made an application to the Bank of Zambia sometime back in October of last year to get your portion of the counter security?

A. Well, immediately as this was notified us, we made a normal application and this was rejected out of hand and we asked for a full figure in U.S. dollars and see what the

> reaction was. There then followed a considerable series of discussions with the Bank of Zambia as to ways and means of doing something about this because we could see problems rising from our side. The situation there is you try to avoid getting anything in writing because once they put something in writing, that's it, that's finished. So we have access as a major company in the country through the Bank of Zambia personnel with the major Government and deputy governor and we try in every possible way and eventually, as recently as the middle of June, eventually got sanction to put up this security in kwacha.

Relative to the letter of guarantee by the Central Bank Mr. Purslow stated:

> I might say, the Central Bank pays nothing. We pay as a company. I have already paid, security has been paid and the only security we have control of we trade in kwachas, we make our profit in kwacha and we get paid in kwacha so we have to put up the required security in the only currency available to us. Because of the requests we have made, we have made application to the bank to see if this security could be converted into another currency. This has been denied.

When the district court denied Respondents' Motion to Reconsider, Respondents offered to post counter-security in the local currencies of Somalia and Zambia, but the district court declined to accept such counter-security.

Upon failure of Respondents to post counter-security in United States currency, the district court ordered the initial security posted by Petitioners to be released, which would have effectively concluded the *in rem* aspect of this litigation but for the timely appeal to the United States Court of Appeals for the Fifth Circuit, which court reversed the district court.

It was inappropriate for Petitioners to argue in their Statement of the Case that Respondents' efforts to post counter-

security were a "sham" or that stockholders of Respondents might have been in a position to post counter-security in hard currency had they so desired. It was also highly inappropriate for Petitioners to comment upon the fact that Respondents are able to obtain legal representation, when invoices for their lawyers' services are long past due.

The district court based its decision on its interpretation of Supplemental Rule E(7) and this is the ruling which was reversed by the court of appeals.

SUMMARY OF THE ARGUMENT

Petitioners efforts to create a constitutional question in this case are strained. The court of appeals simply held the counterclaims of Van Weelde alleging wrongful arrest, etc. did not arise out of the same transaction as Respondents' claims for breach of contract of affreightment, wrongful deviation and conversion of Respondent's cargo and that, therefore, the district court had no authority under Supplemental Rule E(7) to require Respondents to post counter-security. The question of the powers of the district court apart from Rule E(7), such as under its equity power, was not addressed by the court of appeals.

The interpretation by the court of appeals of Rule E(7) creates no conflict among the circuits, as the only contrary opinion, that of the Eleventh Circuit in *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi*, 732 F.2d 1543 (11th Cir. 1984), was subsequently vacated by that court.

Petitioners argue that the decision of the court of appeals is in conflict with the decision of this Court in *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.*, 266 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480 (1924). However, *Washington-Southern Navigation Co.* was based upon the opinion in *Empresa Maritima a Vapor v. North & South American Steam Navigation Co.*, 16 F. 502 (S.D.N.Y. 1883), where both

the original claim and the counterclaim arose out of the same transaction, namely the same charter party.

Lastly, Respondents have made a prima facie case establishing their good faith efforts to comply with the orders of the district court based upon an erroneous interpretation of Rule E(7). Gross injustice would result if Respondents were denied their day in court on the merits of this case because of their inability to post counter-security.

REASONS FOR DENYING THE WRIT

I

The Court Of Appeals Simply Interpreted The Wording Of Supplemental Rule E(7) Without Addressing The Broad, Equitable Power Of The District Court, Sitting In Admiralty, To Require Counter-Security For A Counterclaim Which Did Not Arise Out Of The Same Transaction Or Occurrence As The Original Action.

In their strained effort to present a constitutional question to this Court, Petitioners seem to be saying that by failing to address the equity powers of district courts sitting in admiralty to require counter-security, the court of appeals was in some way denying the existence of such equitable powers. Although the court of appeals did not address that question in this case, Petitioners go back to a former case, *Merchants National Bank v. The Dredge GENERAL G. L. GILLESPIE,* 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed,* 456 U.S. 966 (1982), in which the Fifth Circuit did make mention of such equitable powers.

In the instant case, Petitioners never sought to avail themselves of the equitable powers of the district court with respect to security but relied solely on the provisions of Rule E(7). The court of appeals held that Rule E(7) made provision for counter-security only with respect to counterclaims arising out of the same transaction or occurrence as the original action and that the counterclaims of Van Weelde for wrongful arrest of the M/V SANG JIN arose out of a different transaction from the voyage which gave rise to Respondents' claims.

In stating the issue on the merits in this case the court of appeals said: "This brings us to plaintiffs' contention that Van Weelde's counterclaims are not the type for which counter-security may be required under Admiralty Rule E(7)." *Incas and Monterey Printing and Packaging Ltd. v. M/V SANG JIN,* 747 F.2d 958, 963 (1984). The court of appeals then stated:

"Under the terms of Rule E(7), counter-security may be required when a counterclaim is asserted which arises 'out of the same transaction or occurrence' as the original libel." *Id.* at 964. The court then held:

> We therefore conclude that, whether or not an action for wrongful seizure, abuse of process or malicious prosecution may be asserted as a counterclaim in admiralty practice, counter-security *under Rule E(7)* may not be required for such a claim.

Id. at 965 (emphasis added).

The court of appeals did not decide nor even speak to the question of equitable powers of the district courts sitting in admiralty to require counter-security, nor did Petitioners raise such issue, and there is no valid reason for this Court to address that question now.

II

There Is No Conflict Between The Circuits As To The Equitable Power Of A District Court To Require Counter-Security, The Constitutionality Of Rules B And C, Or The Interpretation Of Rule E(7).

A. Equitable Power Of A District Court To Require Counter-Security.

As already stated, the court of appeals did not decide this case on the question of the equitable powers of district courts to require counter-security in admiralty, but only on its interpretation of Rule E(7). If by some straining of the imagination, the failure of the court of appeals to address such question in some way impinges upon the equity powers of the district courts in admiralty, there would still be no conflict among the circuits, as the only court of appeals to mention such equity powers with respect to counter-security is the Fifth Circuit itself in *Merchants National Bank v. The Dredge GENERAL G. L.*

GILLESPIE, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966 (1982).[3]

B. Constitutionality of Rules B and C.

All the courts of appeals which have considered the constitutionality of the admiralty arrest procedures have upheld the constitutionality of same and thus have laid to rest the constitutional question.[4] As was stated by the Fifth Circuit in *The Dredge GEN. G. L. GILLESPIE:*

> The problems associated with enforcement of a maritime lien by the seizure of a vessel bear little or no resemblance to the garnishment of wages or the replevin of a consumer's stove. The present controversy involves the constitutionality of *in rem* arrest only. Under traditional admiralty law, maritime property is subject to arrest in order to enforce a maritime lien. *The maritime lien has at its basis, to a substantial extent, the historical and theoretical concept of personification: a vessel is liable, as such, for torts and contracts even though the owner may or may not be.* Contrary to the District Court's opinion in *Karl Senner v. M/V ACADIAN VALOR*, 485 F.Supp. 287 (E.D.La.) 1980 A.M.C. 1, the doctrine that the vessel itself has a liability, albeit articulated occasionally in part as a legal fiction, is fundamental in the context of arrest of

---

[3] Interestingly enough, Judge Brown makes no mention of Rule E(7) in his opinion in that case.

[4] *Polar Shipping, Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627 (9th Cir. 1982); *Amstar Corp. v. S/S ALEXANDROS T.*, 664 F.2d 904 (4th Cir. 1981); *Merchants National Bank v. The Dredge GENERAL G. L. GILLESPIE*, 663 F.2d 1338 (5th Cir. 1981), *cert. dismissed*, 456 U.S. 966, 72 L.Ed.2d 865 (1982); *Amoco Overseas Oil Co. v. Compagnie Nationale Algerienne de Navigation*, 605 F.2d 648 (2d Cir. 1979).

vessels. It is no fiction that the law recognizes that a maritime lienor has an *interest* in the vessel. That is a legal fact.

* * *

A maritime lien gives to its holder a property right in a vessel, and the proceeding *in rem* is simply a means of enforcing the property right. Whether the maritime lien arises by operation of law from a tort, from the supplying of goods, services and necessaries to a vessel, or from a preferred ship mortgage like those in the present controversy, the maritime lienor has an interest in the vessel herself, and the arrest of the vessel is to enforce that interest, the maritime lien. The action is to enforce a property right in the vessel.

Arrest in admiralty *in rem* regards the vessel as the interest concerned, and the seizure *in rem* of a vessel accomplished under Rule C brings notice of the action to all persons having an interest in the vessel. The owner of a vessel, as claimant, is clearly an interested person having the right to due process of law before his property is sold. The Admiralty takes care of this right by expressly allowing the owner (or its representative such as the shipmaster) to file a claim and answer. The owner, however, is not a necessary party to the action *in rem*.

663 F.2d at 1345-46 (footnotes omitted) (emphasis added). Similarly, *in Amstar* the Fourth Circuit stated:

We have little doubt that rule C would be invalid if its constitutionality were to be measured solely by the principles explained in *Sniadach* and the other cases on which Nava relies. Our first inquiry, therefore, is whether *Sniadach* and other cases involving common law procedures apply to rule C.

Congress and the Court have always recognized that maritime law differed from the common law. In the Act

that granted the Supreme Court its authority to promulgate procedural rules, Congress provided: "[T]he forms of writs, executions and other process . . . [in suits of] . . . admiralty and maritime jurisdiction, [shall be] according to the principles, rules and usages which belong to courts . . . of admiralty . . . as contradistinguished from courts of common law . . . ." Although rule C was promulgated in its present form in 1966, its provisions for the arrest of a vessel in an *in rem* action can be traced through the Admiralty Rules of 1920 and 1844 with little change. This procedure, moreover, was used long before it was embodied in the rule. Its purpose has always been to provide a means for enforcing a maritime lien, which is the central element of an *in rem* proceeding. Maritime liens, however, are not created by the rule. They are an integral aspect of substantive, rather than procedural, maritime law.

A maritime lien is an essential predicate for the arrest of a vessel in a private *in rem* action. Maritime law, with exceptions not pertinent to this case, gives a maritime lien to the owner of cargo that has been damaged aboard a vessel. *Quite different from a common law lien, a maritime lien is not simply a security device to be foreclosed if the owner defaults. The vessel itself is viewed as the obligor whether or not the owner is also obligated.* Substantive maritime law confers on the holder of a maritime lien a sufficient interest in the vessel to detain it for security and ultimately to subject it to condemnation and sale for satisfaction of the lien. The arrest of the vessel in the proceeding *in rem* is to accomplish this end. "The lien and the proceeding *in rem* are, therefore, correlative—where one exists, the other can be taken, and not otherwise."

These principles were developed to meet the special needs of persons engaged in many aspects of maritme commerce. *By enforcing maritime liens through the arrest of vessels in in rem proceedings, admiralty enables people*

engaged in maritime commerce to obtain redress for certain kinds of injuries caused by the vessel and its crew without seeking compensation abroad from the vessel's owner. The owner, moreover, is not exposed to unlimited liability.

Sniadach and other cases invalidating state garnishment, attachment, and replevin statutes dealt exclusively with common law concepts rather than the unique concerns of maritime law. Neither in these cases nor in a closely related case upholding a sequestration statute based on civil law, did the Court advert to maritime law and practice. The omission is significant. The Court relied on precedents from many areas of the common law, but it found no occasion to refer to its decisions, written over a period of nearly two centuries, involving admiralty suits *in rem.* We, too, must give effect to the significant differences between the common law and admiralty. *The constitutionality of rule C must be determined in the light of the nautical background from which it evolved and with due regard to the substantive maritime law it serves.* Constitutional principles governing creditors' rights at common law cannot be applied mechanically to test the validity of rule C. Therefore, we cannot accept Nava's argument that *Sniadach* and related cases provide controlling precedent for this appeal.

664 F.2d at 907-09 (emphasis added) (footnotes omitted).

C. Interpretation of Rule E(7).

The court of appeals construed Rule E(7) as follows: "*Under the terms of Rule E(7),* counter-security may be required when a counterclaim is asserted which arises 'out of the same transaction or occurrence' as the original libel." *Incas,* 747 F.2d 958 at 964 (1984) (emphasis added).

A panel of one of the United States Courts of Appeals attempted a broader interpretation of Rule E(7) than that set forth by

the Fifth Circuit in this case. *Schiffahrtsgesellschaft Leonhardt & Co. v. A. Bottacchi,* 732 F.2d 1543, *petition for rehearing en banc granted,* 743 F.2d 763 (11th Cir. 1984) (A Rule B case). Since the Eleventh Circuit has granted a rehearing en banc, however, the original opinion has been vacated.[5] The panel said: "First, while the plaintiff need not post bond prior to execution, Supplemental Rule E(7) arms the defendant with the power to compel bond on any counterclaim it files." 732 F.2d at 1548. Such a statement that Rule E(7) allows the defendant to compel bond on "any counterclaim" collides head on with the clear and unambiguous language of Rule E(7), which provides that counter-security can be required "whenever there is asserted a counterclaim *arising out of the same transaction or occurrence* with respect to which the action was originally filed." (Emphasis added). Perhaps this language is one reason that decision has been vacated.

III

The Opinion Of The Court Of Appeals In This Case Is Not In Conflict With The Decisions Of This Court.

The decision of the court of appeals in this case is not in conflict with any decisions of this Court. No case from this Court is in conflict with the construction of Rule E(7) made by the court of appeals. However, we do wish to respond to Petitioners' argument that a 1924 decision of this Court is such a case.

A. Equality of Security

Petitioners contend that, in situations such as in our instant case, the reason for requiring counter-security is to place the parties on an equal basis. Petitioners cite as their authority *Washington-Southern Navigation Co. v. Baltimore & Philadelphia Steamboat Co.,* 263 U.S. 629, 44 S.Ct. 224, 68 L.Ed. 480 (1924), which is based upon the 1883 district court

---

[5] 11th Cir. R. 26(k).

case of *Empresa Maritima a Vapor v. North & South American Steam Navigation Co.*, 16 F. 502 (S.D.N.Y. 1883). In *Empresa* the matter before the court was a charter party dispute which had begun as two separate suits with each plaintiff being the defendant in the alternate case and each claiming a breach of the same charter party. In this context, in speaking of the predecessor of Rule E(7) the language of the court becomes very important:

> The object of rule 53, I cannot doubt, was that in cases of cross-demands *upon the same subject of litigation* both parties should stand upon equal terms as regards security. It was designed, where the libelants in a suit *in rem*, through the arrest of the property, exact and obtain security for their own demand, that in a cross-suit *in personam* for a *counterclaim in respect to the same subject of litigation*, the defendants in the former suit should likewise be entitled to security for the payment of their demands, in case the decision of the court upon the point in controversy should be in their favor. The rule was designed to correct the inequality and injustice of the process of court *in rem* being used to obtain security in favor of one party, *in reference to a single subject of dispute*, while it was denied to the other.

16 F. at 504 (emphasis added). In a dispute over which of the two parties breached the charter party, the court was concerned that each should have an equal chance of recovery and each should be secured in the event the decision went in its favor. This result makes eminent sense when both claims arise out of the same subject matter of the litigation. In the instant case, however, the claims do not involve the same subject of litigation. Respondents' claims are based on the voyage of the SANG JIN on which the problems arose giving rise to Respondents' claims for breach of contract of affreightment, wrongful deviation and conversion of their cargo, whereas the claims of Van Weelde arise out of the subsequent arrest of the SANG JIN.

Also the court stated in *Expresa* that even when all claims arise out of the same subject matter, the requirement of counter-security is not inflexible:

> Where the respondents appear to have a meritorious case, and show circumstances proving their inability to give security under the rule, the court might, in its discretion, according to the circumstances, either deny the order for security altogether, or, on failure to give the security required, order the vessel to be sold, or to be discharged upon the claimant's own stipulation without other security.

16 F. at 505-06. Upon a subsequent hearing on affidavits the court stated:

> [I]t appeared that the original libelant was wholly insolvent, and without other substantial assets than the claim in suit; that it could not give security, except, possibly, after consultation with and assistance from the various creditors for whose benefit the suit was promoted. It did not appear that the owners of the vessel or her captain could not give bonds for at least a considerable part of the claim against her, and the motion for discharge of the vessel was therefore denied.

16 F. at 507. Respondents in the instant case not only demonstrated they were incapable of posting counter-security in U.S. dollars, but they have also satisfied the court of appeals that the counterclaims of Van Weelde did not arise out of the same transaction or occurrence as the claims of Respondents.

The court of appeals found that Respondents "have made an attempt to post counter-security, and have at least indicated a prospective inability to meet the court's demand." 747 F.2d at 963 n.11. This finding of the appellate court was based on the depositions and affidavits of the officers of Respondents.

The excerpts from the deposition of Mohamed Warsame Elmi, the General Director of Incas, set out in Respondents'

statement of the case adequately demonstrated the inability of Incas to post counter-security. To argue that Incas was engaged in a game or sham is fatuous and not supported by the facts.

Petitioners accuse Respondents of simply ignoring the requirement of the district court that Respondents post counter-security. Nothing could be further from the truth. Due to a mix-up for which the district judge was not responsible, the district court issued its original order requiring both sides to post security in equal amounts before Respondents' brief reached the district judge. Respondents then moved the district court to reconsider such order and submitted affidavits and a brief in support of such motion. When the district court denied such motion to reconsider and it was obvious the district court felt bound by Rule E(7) to require counter-security from Respondents in the same amount as the original security, Respondents sought permission of the district court to take an appeal to the United States Court of Appeals for the Fifth Circuit, but the district court denied Respondents' request.

As it was impossible for Petitioners to obtain externalization of funds from the local currencies of Somalia and Zambia into hard currency, Respondents offered to post counter-security in the local currency of each country, but, because of strong opposition by Petitioners, permission to post security in such local currencies was denied by the district court. At that time the district court ordered the release of the original security unless Respondents posted counter-security in United States currency within ten days. Then for the first time, Respondents had an appealable order.

Petitioners speculate that shareholders of the Respondent corporations may have been in a position to post counter-security on behalf of Respondents but ignore the fact that such shareholders were under no obligation to do so. Petitioners also argue that if the governments of Somalia and Zambia could externalize funds for any purpose whatever, such governments acted arbitrarily in declining to externalize funds at the request

of Respondents for the purpose of posting counter-security in this case. Petitioners ignore the fact that hard currency was in such short supply, it was reserved for emergencies such as paying the second freight on their much needed cargo of paper to enable some of their industry to operate.

The affidavits and depositions referred to in Respondents' Statement of the Case were sufficient to satisfy the court of appeals, and we submit Petitioners' arguments with respect to the facts of this case are irrelevant with respect to whether this Court should grant certiorari in this case.

Petitioners have succeeded in delaying the trial of this case on its merits for over two years on this side issue of counter-security, and we submit their petition for certiorari is nothing more than a continuance of their efforts to prevent this case from going to trial on its merits. Should Petitioners ultimately succeed, Respondents would be denied their day in court simply because their countries had insufficient funds to tie up $1,475,000 in hard, western currency, a situation over which Respondents have no control and as to which they are blameless.

B. Compulsory Counterclaim Rule

In their argument on this point Petitioners confuse joinder with requiring counter-security under Rule E(7). The application or inapplication of Rule E(7) has nothing to do with whether or not all parties and all claims should be joined in a single action as often as practical. Judge Brown's opinion in no way affects the joinder of the counterclaims of Van Weelde; it merely states that since the counterclaims do not arise out of the same transaction or occurrence, Rule E(7) does not authorize the district court to require Respondents to put up counter-security pursuant to Rule E(7).

Petitioners cite no cases with which the decision of the Fifth Circuit in this case conflicts. Although petitioners cite *Moore v.*

New York Cotton Exchange, 270 U.S. 593, 70 L.Ed. 750 (1926) the opinion of the court of appeals in this case does not conflict with it. In *Moore* the original claim stated a cause of action in anti-trust seeking to compel the New York Cotton Exchange to furnish trade quotations to the complainant. The Exchange counterclaimed to enjoin the complainant from purloining those trade quotations. Under those circumstances the counterclaim was unquestionably compulsory.

Petitioners do argue with the result reached by the Fifth Circuit and also object to the comparison by that court of Rule E(7) with the compulsory counterclaim rule.[6] Applying the four point test enunciated in *Plant v. Blazer Financial Services, Inc.,* 598 F.2d 1357 (5th Cir. 1979), to the case at bar as urged by Petitioners, one must conclude that the counterclaims asserted by Van Weelde do not arise out of the same transaction or occurrence as the original action. First, the issues of fact and law raised by the original claims and those raised by the counterclaims are not largely the same. All events giving rise to the original claims were over and done with before the events giving rise to the alleged counterclaims arose. All the wrongdoing of Petitioners with regard to the contract of affreightment, the deviation and conversion of Respondents' cargo was completed when Respondents filed their *in rem* action against the vessel and sought to have the vessel arrested.

---

[6] Petitioners also criticize the Fifth Circuit for comparing the counterclaim of Van Weelde for wrongful seizure to a claim for malicious prosecution, saying such comparison was inappropriate, citing *Cardinal Shipping Corp. v. M/S SEISHO MARU,* 744 F.2d 461 (5th Cir. 1984). There is no mention in *Cardinal* of any claim for malicious prosecution, much less whether such claim could not be compared to a claim for wrongful seizure. Moreover, Petitioners' quotation from Judge Rubin's concurring opinion had to do with liability for attorney's fees. Judge Rubin, concerned about the cost of obtaining the release of a vessel wrongfully seized, albeit in good faith, said, "It is time to reconsider whether wrongful seizure, even if provoked in good faith, should not entail liability for attorney's fees, by statute if need be." *Id.* at 475 (Rubin, J., concurring).

Secondly, *res judicata* would not bar a subsequent suit on the counterclaims of Van Weelde. Regardless of the outcome of the original action, Van Weelde would still be able to bring its suit for wrongful seizure, abuse of process, interference with contractual relations and disparagement of its name in the business community. None of these claims relate in any way to the contract of carriage but instead all relate to the actions taken by Respondents to enforce their rights.

Thirdly, substantially the same evidence will not support or refute Respondents' claims as well as Petitioners' counterclaims and contrary to Petitioners' assertion in their brief, Respondents have never conceded that they would. The evidence which will establish Respondents' claims is separate in time and space from that which will establish Petitioners' counterclaims. All the events concerning the original claims took place in places other than Galveston, Texas (where the vessel was arrested) and at earlier times.

Fourthly, there is not any logical relation between the claims and the counterclaims. The only relation between the claims and the counterclaims is that had Respondents not sued Petitioners and had the ship arrested, Van Weelde would not have filed counterclaims against Respondents.

CONCLUSION

The requested writ of certiorari to the Court of Appeals for the Fifth Circuit should be denied for the following reasons:

1. The mere fact that the court of appeals made no mention of the equitable power of a district court sitting in admiralty to require counter-security does not render Rule B or Rule C unconstitutional as the appellate court decided this case solely on its interpretation of the provisions of Rule E(7).

2. There is no conflict among the circuits. The only decision of a court of appeals which mentions the equitable power of a district court in admiralty to require counter-security is the Fifth

Circuit in *The Dredge GENERAL G. L. GILLESPIE.* There is no decision of a court of appeals which conflicts with the interpretation given Rule E(7) by the Fifth Circuit. The only other decision which even mentions Rule E(7) in this context, *Schiffahrtsgessellschaft,* has been vacated.

3. The decision of the court of appeals does not conflict with any decision of this Court, particularly *Washington-Southern* since that case was based on *Empresa* wherein the claim and the counterclaim arose out of the same charter party. In the instant case the counterclaims did not arise out of the voyage on which Respondents' claims for breach of contract of affreightment, wrongful deviation and conversion of their cargo arose but arose out of the subsequent arrest of the SANG JIN.

4. Finally, no valid reason is presented which should cause this Court to grant certiorari in this case and the case should proceed to trial on the merits.

Respectfully submitted,

Alex T. Howard, Jr.

Thomas S. Rue
Post Office Box 1988
Mobile, Alabama 36633
205/432-7682

OF COUNSEL:
JOHNSTONE, ADAMS, HOWARD, BAILEY & GORDON

and

Henry S. Morgan
First City Tower
1001 Fannin
Houston, Texas 77002
713/651-2222

OF COUNSEL:
VINSON & ELKINS

CERTIFICATE OF SERVICE

I, Alex T. Howard, Jr., hereby certify that I have served three copies of the foregoing Brief in Opposition upon Petitioners herein, by mailing same to George J. Koelzer, Esquire, Evans, Koelzer, Osborne and Kreizman, One Harding Road, Red Bank, New Jersey 07701-0569, and Bradley A. Jackson, Esquire, Royston, Rayzor, Vickery and Williams, 220 Texas Commerce Tower, Houston, Texas 77002.

Alex T. Howard, Jr.

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C.A. No. H-82-2573

INCAS AND MONTEREY PRINTING
AND PACKAGING, LTD.,
Plaintiffs,

vs.

M.V. SANG JIN, her engines, tackle, apparel etc., *in rem*, and JOONG ANG SHIPPING CO., her owners and/or operators, VAN WEELDE BROTHERS SHIPPING LIMITED, her owner pro hac vice and/or charterer and/or operator, and GRUNDVIG CHARTERING, INC., her charterer and/or subcharterers and/or operator, *in personam*,
Defendants.

AFFIDAVIT

I, MICHAEL GORDON PURSLOW of 41 Dr. Damie Street, Ndola, Zambia MAKE OATH and say as follows:—

1. I am a British subject. I am the Managing Director of Monterey Printing & Packaging Limited of PO Box. SK 63, Ndola, Zambia ("Monterey") and have been so since June 1979. Prior to that time I was the Commercial Director with the same company from October 1976. I have lived and worked in Zambia for the past 6 years. The facts and matters deposed to by me herein are within my own knowledge. I am duly authorized by Monterey to swear this Affidavit.

2. Monterey is a company incorporated under the laws of the Republic of Zambia. It is a company which is principally concerned with manufacturing a variety of packaging materials in respect of which a substantial percentage of the necessary raw materials is imported. Amongst the

goods which Monterey regularly imports are Pure Virgin Kraft Liner and Semi-Chemical Fluting. Both these goods are used by Monterey for the manufacture of corrugated board which is then converted into a wide range of cartons. Of the total output of corrugated cartons about 50% is used for packaging explosives which are then used in the mining industry; this includes both the coal mines and, more importantly, the copper mines. By way of illustrating the importance of a secure chain of supply and indeed the importance to the Zambian economy of the imported goods to which I have referred, copper represents at least 95% of the foreign exchange earnings capability of Zambia.

3. In my capacity as Managing Director of Monterey, and indeed throughout the period of 6 years which I have worked in Zambia, I have been responsible for all matters relating to the importation of raw materials as a result of which I have considerable experience of dealing, inter alia, with

   (a) the Ministry of Commerce and Industry for the purposes of obtaining import licenses;

   (b) the Bank of Zambia, which is the Central Bank, for the purposes of obtaining foreign exchange allocations;

   (c) Monterey's own bankers who are Standard Bank (Zambia) Limited, a subsidiary of Standard & Chartered Bank, for the purposes of obtaining letter of credit facilities; and

   (d) suppliers and finance houses respectively for the purposes of securing the necessary goods which my company imports and for arranging credit facilities.

4. The Zambian economy is almost totally dependent upon its copper exports and the health of the country's economy can reasonably be said at any particular time to be measured by the prevailing world price for copper. This is

effectively reflected in the daily London Metal Exchange quotations. The year 1982 has seen the lowest world prices in real terms for copper over the past 20 years. It follows from what I have said above that the country's economy is presently in a parlous state as a result of which such limited foreign currency reserves as exist are increasingly very carefully controlled. The ability of a company like Monterey to obtain foreign exchange facilities is becoming increasingly difficult. By way of confirmation of what I have said above it is of interest that in a programme entitled "The World Today" broadcast by the BBC World Service on 13th October 1982 the presenter commenced by saying the following:

"The Government of Zambia has just introduced a series of measures to halt the decline of its foreign currency reserves now believed to be at their lowest level in the country's history. Controls are being tightened on foreign exchange being used to pay for imports and restrictions put on many forms of money transfer out of the country. The measures reflect a further deterioration of Zambia's already desperate trading position...."

In the same programme a journalist of the African Economic Digest said, inter alia, the following:

"The cause is simple. World depression has led to a sharp reduction in copper prices in Zambia which depends on copper for 95% of its foreign exchange earnings and every time the price for copper falls by *L*1 on the international market that costs Zambia *L*½ million and at the moment Zambia is producing its copper at a loss. Prices are well under cost of production for Zambia and have been for a number of years, or at least 2 years. The foreign exchange situation has demanded that there be a cut back of allocations to industry and that has already had a cost...."

5. During May of this year I visited England for the purposes of obtaining finance for a range of raw material imports including Pure Virgin Kraft Liner and Semi-Chemical Fluting. I now particularly refer to the purchase my company made from Firn Overseas Packaging Limited of Hungerford, Berkshire of 750 tons of Pure Virgin Kraft Liner and 525 tons of Semi-Chemical Fluting for which contracts were concluded in June of this year. Having regard to the exchange control limitations to which I have previously referred it was necessary for my company to use the services of a company called Plenum Finance and Investment Limited of Hong Kong acting as a confirming house and who, in the first instance, arranged letter of credit facilities and who, in due course, have received payment from Monterey in local currency by means of bills of exchange drawn in their favour. Part shipment of the consignments to which I have referred was effected respectively at Savannah, Georgia and St. John, Canada when 679.777 metric tonnes of Pure Virgin Kraft Liner and 520.613 metric tonnes of Semi-Chemical Fluting was shipped on board the vessel "SANG JIN" and for which Ocean Bills of Lading were issued by Grundvig Chartering Inc, as Agents for the Master, showing Dar-Es-Salaam as the discharge port. I understand Grundvig to have been the Sub-Time Charterers of the "SANG JIN" at the material time.

6. In relation to the importation into Zambia of these consignments the necessary government approval had been obtained and import licenses issued. Payment in foreign currency to Plenum under the Bills of Exchange at 120 days had been approved by the Bank of Zambia within the terms of the Exchange Control Act.

7. In early August of this year my company learned that for reasons which are still not clear to me the "SANG JIN" had deviated to Pensacola, Florida and there discharged

the consignments to which I have referred into warehouses. I am advised by my English solicitors that the carriers were thereby clearly in breach of the contract of carriage evidenced by the Bills of Lading.

8. In accordance with my company's instructions the "SANG JIN" was subsequently arrested at Galveston and the proceedings herein commenced against the various Defendants.

9. I am now advised that this Honourable Court has ordered not only that security in the sum of US $1.475 million be provided to the Plaintiffs, which security I understand now to have been provided althouth I have not seen the relevant documentation, and further that security for a like amount be provided by cargo to the Defendants in respect of their purported Counterclaim which was originally put forward in the sum of US $2.96 million.

10. I am bound to say that I am considerably surprised that as an innocent party my company, as co-Plaintiff with Somali cargo interests, should be ordered to provide security to the Defendants who, in my respectful submission, are wholly responsible for the events which have taken place and to which these proceedings refer. As a result of the deviation of the "SANG JIN" to Pensacola and the discharge there of my company's cargo, Monterey have a prima facie claim in respect of which, and for the purposes of obtaining security, the Vessel was arrested.

11. Notwithstanding my expressed surprise, which is supported by the legal advice which my company has obtained, the principal purpose of swearing this my Affidavit is respectfully to make it clear to this Honourable Court that it is simply not possible for may company to provide security, or indeed any part thereof, which has been ordered in favour of the Defendants. The reasons for that inability result from the severe restrictions on the use of

limited foreign exchange resources to which I have referred above. My company has, nevertheless, made application to the Bank of Zambia in order to endeavour to obtain the necessary allocation of foreign exchange which would enable security to be provided; at the time such application was made the sum of US $2.96 million, being the quantum of the Defendants' notified Counterclaim, was requested. That request has been firmly rejected as evidence of which there is not produced and shown to me a true copy of a telex dated 13th October 1982 from the Bank of Zambia which is Exhibit "MGP 1" hereto. Throughout the period concerned I have maintained close and regular touch with those concerned at the Bank of Zambia and it has been made quite clear to me, although this is not clear from the telex which is Exhibit "MGP 1" hereto, that even if a lesser sum had been requested this too would have been refused. In short, the Bank of Zambia, as custodian of the country's foreign exchange resources, is not prepared to allocate any of such scarce resources for the purpose requested.

12. I well appreciate that so far as concerns the Defendants they may well take the view and say that it is for these very reasons that they require security. In my respectful submission this Honourable Court should have regard to the circumstances as I have truthfully described them to be. I further respectfully submit that the Plaintiffs should be entitled to retain the benefit of the security which has now been provided to them without being required themselves to provide any security for the purported and, I suggest, questionable claims of the Defendants. In view of the circumstances in which my company now finds itself, following discharge of its cargo at Pensacola and the need to effect reshipment at considerable expense, it would be wholly wrong that the Plaintiffs should be denied the benefit of their security for reasons solely that they are unable to provide any security themselves.

13. Accordingly, I respectfully request that this Honourable Court reconsider the Order made against the Plaintiffs for the provision of security in the sum of US $1.475 million and that such Order now be removed but that at that same time the Plaintiffs be entitled to retain the benefit of the security they have themselves received in that amount.

SWORN at ICI Salisbury House
London Wall, London ECZ
England, this 14th day of
October 1982

Before me,

A Notary Public
My Commission expires with life

APOSTILLE

(Convention de La Haye du 5 octobre 1961)

1. Country: United Kingdom of Great Britain and Northern Ireland
   Pays: Royaume Uni de Grande Bretagne et d'Irlande du Nord

   This public document/Le present acte public

2. has been signed by /s/ R. C. Rosser
   a ete signe par

3. acting in the capacity of Notary Public
   agissant en qualite de

4. bears the seal/stamp of the said Notary Public
   est revetu du sceau/timbre de

5. at London/a Londres

Certified/Atteste

6. the/le 15th October 1982

7. by the Foreign and Commonwealth Office/par le Ministere des Affaires et du Commonwealth

8. Number/sous No. D080121

9. Stamp: timbre: [SEAL]

10. Signature: /s/ A. R. Hubbard
    For the Secretary of State for Foreign and Commonwealth Affairs
    Pour le Secretair d'Etat aux Affaires Etrangeres et du Commonwealth

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-82-2573

INCAS AND MONTEREY PRINTING
AND PACKAGING LTD.
Plaintiffs,

v.

M.V. SANG JIN, her engines, tackle, apparel etc., *in rem* and JOONG ANG SHIPPING CO., her owners and/or operators, VAN WEELDE BROTHERS SHIPPING LIMITED, her owner pro hac vice and/or charterer and/or operator, and GRUNDVIG CHARTERING INC., her charterer and/or subcharterers and/or operator, *in personam*,
Defendants.

AFFIDAVIT OF MICHAEL GORDON PURSLOW

Norton, Rose, Botterell & Roche
Kempson House,
Camomile Street,
London EC3A 7AN

Telephone 01-283 2434
Reference NPE/14/C124705

English Solicitors for Monterey
Printing & Packaging Limited.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

C. A. No. H-82-2573

INCAS AND MONTEREY PRINTING
AND PACKAGING LTD.
Plaintiffs,

v.

M.V. SANG JIN, her engines, tackle, apparel etc., *in rem* and JOONG ANG SHIPPING CO., her owners and/or operators, VAN WEELDE BROTHERS SHIPPING LIMITED, her owner pro hac vice and/or charterer and/or operator, and GRUNDVIG CHARTERING INC., her charterer and/or subcharterers and/or operator, *in personam,*
Defendants.

This is the Exhibit marked "MGP 1" referred to in the Affidavit of Michael Gordon Purslow dated the 14th day of October 1982

Before me,

A Public Notary.

"M.G.P.I."

12.09
MONTY ZA34380

ZBANK ZA41560

MONTY ZA34380
M G PURSLOW
MANAGING DIRECTOR
MONTEREY PRINTING AND PACKAGING
13/10/82

TELEX NO MONTY ZA 34380

REFERENCE MADE YOUR TELEX WHEREIN YOU SEEK APPROVAL FROM BANK OF ZAMBIA TO PROVIDE US DOLLARS 2.96 MILLION AS SECURITY IN CLAIM FOR CARGO WHICH WAS OFFLOADED IN U S A STOP

DUE TO CURRENT FOREX CONSTRAINTS IT IS NOT POSSIBLE FOR BANK OF ZAMBIA TO PUT UP THIS AMOUNT AS FOREX STOP CONSEQUENTLY APPROVAL HAS BEEN DECLINED STOP REGARDS

T D MULONGA
DIRECTOR EXCHANGE CONTROL
BANK OF ZAMBIA LUSAKA

COL US DOLLARS 2, EEE 2.96 MILLION CKD
PM
ZBANK ZA41560
MONTY ZA34380

INCAS

ARAARA-JAMAAMA-JUBBADA HOOSE (SOMALIA)

SL_____
N.Prot Wek/179/82

UJEEDDO

AFFIDAVIT

TO WHOM IT MAY CONCERN

I, THE UNDER-SIGNED, ADAN ABDI HUSSEIN, PRESIDENT OF I.N.CA.S. S.p.A. DECLARE THAT OUR COMPANY HAS ALL ITS PROPERTY IN SOMALIA AND IS NOT IN A POSITION TO DEPOSIT BOND OR CASH AGAINST THE COUNTER-CLAIM OF VAN WEELDE.

Adan Abdi Hussein
President
I.N.CA.S.

SOMALI DEMOCRATIC REPUBLIC
MINISTRY OF FOREIGN AFFAIRS

This is to certify that the above is the true signature of
Adan Abdi Hussein
President
I.N.C.A.S.

MOHAMED HASSAN SAID
DIRECTOR OF LEGAL DEPARTMENT WAD/WSH/7420

Somali Democratic Republic
Region of Benadir
City of Mogadishu
American Embassy

I, John Francis Keefe, Jr., Consul of the United States of America at Mogadishu, duly commissioned and qualified, do hereby certify that Dr. Mohamed Hassan Said, whose true signature and official seal are respectively affixed to the annexed document, was on the 7th day of October, 1982, the date thereof, the Director of the Legal Department of the Somali Ministry of Foreign Affairs, to whose official acts faith and credit are due.

IN WITNESS WHEREOF I have hereunto set my hand and official seal this 7th Day of October, 1982.

/s/ JOHN FRANCIS KEEFE, JR.
Consul Of The United States of America